No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY,
(a corporation),
Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation), and HARNEY VALLEY IMPROVEMENT COMPANY,
(a corporation),
Appellees.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

This is an appeal from a portion of a decree of the United States Circuit Court for the District of Oregon. The decree in the main is in favor of complainant and appellant, and the appeal is by complainant only from the portion of the decree which is in favor of defendants.

The Facts.

The Complaint.

This suit was brought in the United States Circuit Court of the District of Oregon by the Pacific Live Stock

Company (a corporation), against the Silvies River Irrigation Company (a corporation), and Harney Valley Improvement Company (a corporation). The bill of complaint (Trans. pp. 3-17) alleged that complainant was the owner of a large tract of land situate in Harney Valley, Harney County, Oregon; that the land lies along and is riparian to the Silvies River and its branches and forks; that on said land are numerous sloughs, minor channels and swales, which put out from the main channel of the river and its forks, and the waters of said river and its forks, and of said sloughs, minor channels and swales naturally flow upon and through said land; that the climate of said Harney Valley is dry and the soil is naturally arid, except as it is watered by or from said river; that the land of complainant is best adapted to the growth of grass hay and pasture; that during the last ten years complainant has raised, mowed and cured a large quantity of natural grasses growing on said lands for hay, and has used the remainder of said natural grasses for pasture, for the support of large numbers of cattle; that complainant is entitled to the full, regular and natural flow of the water of said river at all stages of the flow of the waters therein, subject only to the vested rights of other riparian owners on said stream; that very often the flow of said waters is not sufficient in quantity for irrigation of said lands; that the flow of said waters to and upon said lands is at all times very beneficial to said lands and adds very greatly to the productiveness and fertility thereof, and gives said lands the greatest element of their value; that if the flow of said waters is taken away from said lands

said lands will become arid and greatly diminished in value; that the annual rainfall on said lands is small in quantity; that said lands, unless irrigated otherwise than by the natural rainfall, will not produce sufficient vegetation and will not enable complainant to pasture its cattle thereon; that during the spring months of every year there is a large increase in the volume of water flowing down said Silvies River, caused by the melting of the snow in the watershed of said river; that the annual increased flow of water coming down said river at such times has from time immemorial caused said river in the various channels thereof to overflow and to cover with said overflow a large portion of the lands of complainant for a limited period of time each year; that said waters so overflow on account of the slight slope of the lands in said Harney Valley; that the water causing and constituting such overflow has in each year brought large quantities of silt and material to said lands from the mountains and ravines through which said river and its tributaries flow in their course to said lands of complainant, and deposited said silt and material on complainant's lands and thereby fertilized and enriched said lands and caused said lands annually to yield increased crops of grasses and feed for complainant's stock, and has largely increased the value of said lands; that without such overflowing said lands would have produced little or no feed or crops unless said lands were artificially irrigated; that during the lowest stages of the flow of the waters of said Silvies River and its various channels the waters thereof are confined to and flow within the banks of the same; that when the flow of the

waters of said river increases in each year as aforesaid, such increased flow thereof naturally flows over and covers the meadow-lands adjacent to the channels of said river; that said overflow waters, together with the waters confined within the banks of said channels of said river, flow in a definite southeasterly direction through said lands of complainant, and that when the volume of water flowing through said channels of said river diminishes in the summer months of each year, so much of the overflow waters as have not been consumed in irrigation gradually recede to and within the banks of the various channels and waterways of said river.

The complaint further alleges that in the month of October, 1907, the defendants commenced the construction of a ditch taking out of the river, six feet deep, forty feet wide on the top and twenty-two feet wide on the bottom, with a grade of four feet to the mile,* with the intention of diverting a large volume of water above the land of complainant; that none of the water so threatened to be diverted will ever return to the river, and all thereof will be prevented from flowing to said land and will be wholly lost to complainant; that the capacity of said ditch is intended to be such that the same will be sufficient to divert all of the waters of said river after the spring flow has subsided; that by reason of such diversion complainant will be deprived of the valuable and increased crops, feed and pasture on said

*Such a ditch would have a capacity of 800 cubic feet per second.

land and said lands will be greatly deteriorated in quality and greatly depreciated in value; that such diversion at any time during any of the stages of the flow of said river will cause great and irreparable damage and injury to complainant; that all of said water is actually needed and used by complainant for the irrigation of its lands, for water for its stock and for domestic use; that without said water said lands will not be supplied with water sufficient for the production of crops, feed and pasture thereon, or for watering of stock, or domestic use; that if said waters are diverted the crops will dry up and be destroyed and complainant will not receive the water which it is entitled to receive as a riparian owner for the irrigation of its lands and for such other purposes as a riparian owner is entitled to use the same; that it will be impossible to estimate the value of the crops, feed and pasture of which complainant will be deprived, or the amount of the decrease in the value of said land.

The prayer was that defendants be enjoined from diverting any water from the river above the lands of complainant.

The Answer.

The defendants' answer (Trans. pp. 18-28) alleged that in the spring of the year the natural flow in Silvies River is much more than sufficient for the use of complainant on said lands and much greater than any use to which complainant has ever put such full spring flow of the river and is greater than any use which complainant can put said waters to on said land; that at times

the flow of water is so great as to be a detriment; that defendants have good and lawful right to divert the surplus and excess flood waters of Silvies River by reason of appropriations of such surplus flood waters; that no water to which complainant has any claim of right will be diverted by respondents, but that respondents will divert only the surplus and excess flood waters, and that complainant will receive all the water which it now has received to its beneficial use on said lands, and will not in any way be injured by the ditch and diversion of flood water contemplated by respondents; deny that respondents will divert any waters to which any one has a vested right, but aver that they will divert only the excess spring flood water which goes to waste and is a detriment.

The answer further disclaims any right or color of right, or intention to take any water whatever to which any one has any vested right prior to the filing of the appropriation by defendants, that they only claim to appropriate so much of the water as is not already appropriated by any one, and the intention of respondents is to carry off the surplus waters to which no one has right or title, and which go to waste and form, together with other water, the Malheur marshes and lake, and that they have not intended and do not now intend to take any water which any one has put to a beneficial use, and disclaim any intention to invade the legal rights of any one, but only claim and intend to use such water as no one else is putting to a beneficial use; that there is a great surplus of flood water and surplus water in Silvies River which has not been beneficially used by

complainant or by any one, but which goes to waste; that if upon actual trial it shall prove that respondents deprive complainant, or any one, of any water heretofore beneficially used by complainant or by any one, then these respondents disclaim any right to such water so put to a beneficial and prior use by complainant or any one, and agree to modify their plan, or if necessary discontinue it altogether, so that the acts of respondents may not conflict with the established rights of others.

The Opinion.

The evidence not being material on this appeal, it is not contained in the record. The general purport of it, however, is shown by the following opinion of the trial judge (Trans. pp. 28-29):

> "This is a suit brought to restrain the defendant companies from diverting the waters of Silvies River for irrigating purposes. From the point where the river debouches into the valley down to Malheur Lake, a distance of several miles, the land is comparatively level with but a slight fall towards the lake. Through this territory the river divides into numerous branches and forks. The channels are narrow and shallow and incapable of retaining any considerable portion of the water during the spring freshets, and the adjoining land is thereby naturally irrigated from the waters flowing out through the various sloughs and depressions and spreading over the surface of the country. The land is very productive when so irrigated and practically valueless without water. The defendant company plans to intercept the flow of the water near the head of the valley and divert it from the watershed to irrigate arid lands to the east. The complainant and other parties own large quantities of valuable land naturally irrigated from the river be-

low the point of the defendant's proposed diversion, and the object of this suit is to prevent such diversion. The defendants claim the right to take the surplus water only and disclaim any intention of interfering with the rights of any of the settlers. But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings, and which is annually irrigated by the overflow if undisturbed. Until it is adjudicated in some appropriate proceeding that there is a surplus of water and the quantity thereof, I do not think the defendant should be permitted to interfere with the natural flow and thus invite numerous lawsuits and controversies between it and the settlers.

"Decree will therefore be entered as prayed for in the bill, but a provision may be inserted at the foot thereof, reserving the right to the defendants to apply for a vacation of the injunction if it should hereafter be determined that there is any surplus water subject to appropriation by it."

The Decree.

The decree (Trans. pp. 30-37) finds that the waters of the river are used by complainant and others for the irrigation of land through which the same flow; that the land where so irrigated is very productive, but practically valueless without water; that complainant owns the lands described in the complaint which are irrigated by the waters of the river; that complainant for a number of years has raised, mowed and cured a large quantity of hay and has used natural grasses for pasture; that parties other than complainant also own large quantities of valuable land so situated and irrigated upon the river; that defendants intend to divert water to non-

riparian lands; that defendants claim the right to take surplus water from said river, that is to say, water not required for irrigation of the complainant's lands and other land now being irrigated by means of the waters of said river, and disclaim any intention of interfering with the rights of complainant or any of the settlers or landowners whose lands are irrigated by means of the waters of said river; that all of the water of Silvies River is necessary for the irrigation of the complainant's lands and the lands of others irrigated from the waters of said river, and which are annually irrigated by the waters of said river, and by the diversion contemplated by the defendants, the complainant and others owning lands irrigated from said river will be deprived of valuable feed and crops, their lands rendered less valuable, and the complainant will be greatly damaged and injured, and such diversion will cause great and irreparable damage and injury to complainant.

The decree, accordingly, enjoined the defendants from diverting any water from the river above the lands of complainant. At the end of the decree (Trans. p. 37), appears the

Portion of the decree appealed from:

> "It is Further Considered, Ordered, Adjudged and Decreed that there be reserved to the defendants above named and to each of them the right to apply to this Court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them or by either or any of them."

Assignment of Errors.

(Trans. pp. 40-41.)

1. The court erred in reserving to the defendants the right to apply to the court for the vacation of final injunction in said suit.

2. The court erred in reserving to the said defendants the right to litigate in any proceeding the question as to the existence of any surplus water subject to appropriation by them, or either of them.

Argument.

It will be seen from the foregoing that defendants conceded the right of complainant to have the stream flow to its land so far as the same was beneficial to complainant, and disclaimed any intention to divert any water beneficially used by complainant or any one else, and sought only to divert the surplus water of the river, or water not required for irrigation of the complainant's lands and other land now being irrigated. This, therefore, raised, first, the question of *fact* as to whether there was any such surplus, and, secondly, the question of *law* whether the defendants were entitled to divert such surplus if it existed. The question of fact was litigated and found against the defendants, so that the question of law became unimportant. Nevertheless the court reserves to the defendants the right to "have de- " termined in some appropriate proceeding that there " is any surplus water", and after such determination the right to "apply to this court at any time hereafter

"for a vacation of the injunction". Under these circumstances we contend, *first,* that the question of *fact* as to whether there was any surplus water which could be appropriated by defendants without injury to complainant was put in issue, tried and determined in this case, and, therefore, it was improper for the decree to reserve to the defendants the right to again litigate that question in some other forum or in some other proceeding; *second,* that even if there was shown to be a surplus of water over and above the actual amount required to irrigate the lands of complainant and other users of water, as a matter of *law,* that would not justify its diversion by defendants, and therefore it was improper to reserve to defendants the right to vacate the injunction if such surplus were found to exist. This question of *fact* and this question of *law* we will briefly and separately argue.

First.

THE QUESTION OF FACT AS TO WHETHER THERE WAS ANY SURPLUS WATER WHICH COULD BE APPROPRIATED BY DEFENDANTS WITHOUT INJURY TO COMPLAINANT WAS PUT IN ISSUE, TRIED AND DETERMINED IN THIS CASE, AND, THEREFORE, IT WAS IMPROPER FOR THE DECREE TO RESERVE TO THE DEFENDANTS THE RIGHT TO AGAIN LITIGATE THIS QUESTION IN SOME OTHER FORUM OR IN SOME OTHER PROCEEDING.

From the statement of the pleadings it is clear that the complainant clearly challenged the right of defendants to divert any water from the river. It was there-

fore the clear duty of defendants to set up any right which they claimed to divert the water, under penalty of doing forever foreclosed from doing so. They answered disclaiming any right to divert any water except the surplus water "which has not been beneficially used by " complainant or by any one, but which has gone to " waste". This necessarily raised the issue as to whether or not there was any "surplus water which has not " been beneficially used by complainant or by any one, " but which has gone to waste". The decree shows that this issue was tried, and from a review of the evidence the court found as a fact that "all of the water of " Silvies River is necessary for the irrigation of com- " plainant's lands and the lands of others irrigated from " the waters of said river", and consequently a decree was entered enjoining defendants from diverting any water from the river. It is, therefore, clear that the defendants were bound to and did set up their asserted right to surplus water, that the court was bound to adjudge the existence or non-existence of such surplus water, and did adjudge the non-existence thereof. It therefore adjudged the very fact which it makes the basis of a reserved right of defendants to vacate the decree.

It is a well settled principle of law that there must be an end to litigation. Consequently, a complainant cannot split up his cause of action, nor can a defendant present his defenses in part, reserving the right to litigate other defenses subsequently. If the complainant only brings forth part of his claim, he is barred from

subsequently asserting the balance. If a defendant fails to bring forth a defense, he is estopped from urging it against the effect of the judgment. If either of them presents claims but fail to support them, they are merged in the judgment, the same as if actually tried. Each party is entitled to a judgment on every right or defense asserted, that there may be an end to litigation. The court cannot reserve any question which is squarely presented and necessary for a complete determination of the controversy. No proceeding can be a more "appropriate proceeding" in which to determine the controversy than the proceeding in which the controversy is first presented to the court. The court can imagine the great expense and trouble to which complainant was put in order to meet the issue presented by defendants. Although the evidence is not before this court, the court knows that the Silvies River flows through the Harney Valley in two branches known as the east and west forks. We showed the total irrigation from this stream and the total water available therefor. After an elaborate trial we were able to show beyond a question that all of the water of the river is already appropriated and beneficially used, but were deprived of the benefit of our success by the provision at the foot of the decree to the effect that defendants may have "determined in some " appropriate proceeding that there is any surplus of " water subject to appropriation by them or by either " or any of them". Let us see

The Practical Effect of this Decree.

Complainant was entitled to have this controversy tried and finally determined by the tribunal chosen by it and constituted to determine controversies between citizens of different states. Suppose the State of Oregon should establish (as it in fact has established)* a water commission having judicial power to determine conflicting rights in streams. The defendants, acting under the reservation in this decree, might institute an "appropriate proceeding" before such tribunal against all the water users on the stream to have established " that there is any surplus water subject to appropria- " tion by them or either or any of them". Such a proceeding not being entirely between citizens of different states, would not be removable. On the trial the tribunal might decide every question to the direct contrary of the decision in this case. It might find that there was twice the quantity of water found to be available in this case. It might find that half the amount found in this case to be necessary to irrigate the land irrigated was in fact sufficient. It might find that only half the land found in this case to have been irrigated was in fact irrigated. As a result of this difference in probative facts, it would necessarily reach the conclusion that there was in fact "surplus water subject to appropriation" by defendants. This would not only involve the question of *fact* of the existence of such surplus water, but the question of *law* of the right of defendants to appropriate it as

*Laws of Oregon 1891, p. 52; 1901, p. 136; 1899, p. 72; 1909, p. 319.

against complainant. In the case at bar we had a right to have determined both the question of fact and the question of law. The court found the question of fact in our favor. Therefore the question of law became unimportant. If the fact had been decided against us, we would still have been entitled to have the court decide the question of law, and the court had no right to reserve to defendants the right to have either this question of fact or this question of law determined in any other proceeding. We therefore submit that the court having found that there was no surplus water should have absolutely enjoined defendants from diverting water from the river, and that the reservation in the decree is improper.

SECOND.

EVEN IF THERE WAS SHOWN TO BE SURPLUS WATER OVER AND ABOVE THE ACTUAL AMOUNT REQUIRED TO IRRIGATE THE LANDS OF COMPLAINANT AND OTHER WATER USERS, AS A MATTER OF LAW THAT WOULD NOT JUSTIFY ITS DIVERSION BY DEFENDANTS, AND THEREFORE IT WAS IMPROPER TO RESERVE TO DEFENDANTS THE RIGHT TO VACATE THE INJUNCTION IF SUCH SURPLUS WERE FOUND TO EXIST.

We have already shown that, since the court had already determined as a fact that no surplus existed, it should not have reserved to the defendants the right to have the decree vacated if the contrary fact should be determined. This is as far as we need go to obtain a reversal of the portion of the decree appealed from, and probably as far as the court will deem it necessary

to go. But we also contend that the mere fact that there may be such a surplus would not justify its diversion by defendants or deprive us of the right to have a threatened diversion enjoined. We alleged in our complaint and the court found that the flow of the stream was highly beneficial to our land. We alleged that we were entitled to the full flow of the entire stream. We were entitled to an adjudication upon this allegation. If we were only entitled to the mere amount actually necessary for the irrigation of our lands, that should have been decided. By reserving to the defendants the right to vacate the injunction the court either impliedly decided that defendants could divert such surplus if it existed, or it did not decide the matter at all. In either event, we contend that the decree is erroneous. We can safely state that the following principles have been firmly established by the judicial decisions in the State of Oregon:

1. *Under the law of Oregon, the owner of riparian land is entitled to have the stream flow by, through and over his land, subject only to the right of other riparian owners to make a reasonable use of the water, and is entitled to enjoin any diversion of the water above him.*

Taylor v. Welch, 6 Or. 198;
Coffman v. Robbins, 8 Or. 278;
Hayden v. Long, 8 Or. 344;
Shively v. Hume, 10 Or. 76;
Shaw v. Oswego Iron Co., 10 Or. 371;
Shook v. Colohan, 12 Or. 239; 6 Pac. 503;
Weiss v. Oregon Iron Co., 13 Or. 496; 11 Pac. 255;

Faull v. Cooke, 19 Or. 455; 26 Pac. 662;
Jones v. Conn, 39 Or. 30; 64 Pac. 855;
Cox v. Bernard, 39 Or. 53; 64 Pac. 860;
Morgan v. Shaw, 47 Or. 337; 83 Pac. 534;
Ison v. Nelson Mining Co., 47 Fed. 199;
Brown v. Gold Mining Co., 48 Or. 277; 86 Pac. 361;
Oregon Con. Co. v. Allen Ditch Co., 69 Pac. 456;
William v. Altnow, (Or.) 95 Pac. 202.

2. *The right of the riparian owner is not limited to the right to have flow to his land the mere amount of water necessary to irrigate his land, but he is entitled to all the natural advantages of having the stream flow through his land, including the benefit of overflow and seepage.*

Heilbron v. Fowler Switch Canal Co., 75 Cal. 426;
Heilbron v. Last Chance Water Co., 75 Cal. 117;
Anaheim Union Water Co. v. Fuller, 150 Cal. 327;
Stanford v. Felt, 71 Cal. 249;
Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68;
Cal. Pastoral & Agr. Co. v. Enterprise etc. Co., 127 Fed. 741;
Huffner v. Sawday, 153 Cal. 86;
Miller & Lux v. Madera etc. Co., 155 Cal. 59;
Miller v. Bay Counties Water Co., 157 Cal. 256.

3. *The right of the riparian owner extends to the flow of the stream at all its stages and includes the right to the spring flood as well as the lower stages of the*

stream, to water flowing through sloughs, and even to water flowing out of the defined banks of the river but in a usual and continuous current.

West v. Taylor, 16 Or. 165;
Mace v. Mace, (Or.) 67 Pac. 660;
Miller & Lux v. Madera C. & I. Co., 155 Cal. 59, 78;
Miller v. Bay Counties Water Co., 157 Cal. 256.

4. *The only case in which an injunction has been refused in any state where riparian rights are recognized is where the water is a positive detriment to the riparian owner.*

The limits of this brief are insufficient to justify an exhaustive review of the authorities applicable to the right of a riparian owner to enjoin an interference with the stream above. It is true that there are a few cases in which such relief has been refused, owing either to lack of proof or exceptional conditions, and those who are opposed to the entire doctrine of riparian rights eagerly fall upon those cases to entirely destroy all the substantial benefits of riparian ownership. The task of taking away the ownership of water from the lands to which nature attached it, and to which the law has permanently affixed it as a vested right of property protected by the due process of law clause of the Constitution,* and giving it to the "people" (which generally

**Lux v. Haggin,* 69 Cal. 255.

means a speculating corporation which desires to capitalize something which it obtains for nothing), seems to be a pleasant one to persons of a certain class. It seems to be a popular idea also, but to the honor of the courts it may be said to be one which has received no considerable judicial sanction, as the following brief review of the authorities will show:

Heilbron v. Fowler Switch Canal Co., 75 Cal. 426.

In this case the plaintiff, a riparian owner, sought to enjoin an appropriator from diverting the waters of Kings River. The defendant admitted the threatened diversion and rested its defense on the proposition that it did not intend to take all the water, or a sufficient quantity to injure the lands of plaintiff. The court disposed of this claim in the following language:

> "It does not follow, because the injury is incapable of ascertainment, or of being computed in damages, and therefore only nominal damages can be recovered, that it is trifling or inconsiderable. It is doubtful if it can properly be said that there is any evidence in the case which tends to show, or if that which was offered would have tended to show, that the injury to plaintiffs was inconsiderable; that it was unascertainable, and in that sense inappreciable, may be a good reason why an injunction should issue.
>
> "This question is, however, not an open one in this state, but has been repeatedly passed on and settled in unmistakable terms (*Lux v. Haggin,* 69 Cal. 258; *Moore v. Clear Lake W. Co.,* 68 Cal. 150; *Stanford v. Felt,* 71 Cal. 249; *Parke v. Kilham,* 8 Cal. 77; 68 Am. Dec. 310; *Ferrea v. Knipe,* 28 Cal. 341; 87 Am. Dec. 128).
>
> "No doubt there are cases in which a court will refuse to interfere by injunction to prevent a tres-

pass, where it can see that the injury will be slight, and the injunction may work great injury. Here the defendant professes to take from plaintiffs their property, really upon the plea that it is worth but little to the plaintiffs, and much to the defendant. It is not an ordinary trespass. It is a perpetual taking of the property of the plaintiffs,—a continuous nuisance, which may ripen into a right unless prevented.

"The injury is one, also, which in its nature, cannot be estimated. In the recent case of *Heilbron v. Last Chance Company* it was said: 'The flow of water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and this stimulates vegetation, and the growth and decay of vegetation add not only to the fertility, but to the substance and quantity of the soil'.

"If this be so,—and it cannot be doubted,—it is obvious that in a climate like that where this land is situated, the benefit derived from a flow of water for thirty miles along its boundary, and ten miles through it, cannot be inconsiderable, but yet the extent of benefit must ever be an unknown quantity.

"The defendant here states that the channel of the river above and along this land is deep, and therefore at times of ordinary flow the seepage cannot be great. If so, it must be important to plaintiffs that the channel should carry a full stream, and evidently at such times the percolation would be increased." (Opinion, pp. 430-2.)

Heilbron v. Last Chance etc. Co., 75 Cal. 117.

This was an appeal from a judgment of the same court in an action commenced by the same plaintiff as in the case of *Heilbron v. Fowler Switch Canal Co.,* supra. The question was whether or not a reversioner could maintain an action for the diversion of water from

a stream to which his land was riparian. Deciding the case in the affirmative, the court pointed out the great value of the continued natural irrigation of land and the damage following the interruption of such irrigation.

> "The flow of natural water over land is a continuous source of fertility and benefit; and its withdrawal is followed by consequences which are perpetually injurious to the freehold. This is strikingly illustrated by the averments in the complaint in this case, 'that the waters of said Kings River have hitherto been accustomed to overflow, seep through, and moisten the lands of said rancho, whereby the fertility of said lands was greatly increased, and a large and valuable quantity of natural grass was produced upon said lands'; and that, by reason of the diversion of the water by defendant, 'said lands have failed to produce their accustomed crops of natural grass'. The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation; and the growth and decay of vegetation add, not only to the fertility, but to the very *substance and quantity* of the soil. It is not true, therefore, as claimed by appellants, that the water of a natural stream may be taken away from land for a great number of years, and then turned back, without any permanent injury to the land. Moreover, according to the riparian doctrine (upon which appellants rely in this case), 'the right to the flow of water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, *but as a parcel.*" (Opinion, pp. 121-2.)

Anaheim Union W. Co. v. Fuller, 150 Cal. 327.

In this case riparian owners sought to enjoin upper riparian owners from using the water of the stream on nonriparian land. The defendants claimed, among other

things, that a greater quantity of water remained in the stream after their diversion than plaintiffs needed and that hence no injunction should be granted. The Supreme Court refused to countenance any such rule, holding to the strict rule of riparian rights prevailing in California and Oregon. Following is the language of the court:

> "The defendants urge, inasmuch as the plaintiffs need but four hundred inches of water for their land, and there remained in the stream after defendants' diversion more than two thousand inches, which flows down to and beyond the plaintiffs' land, and which is more than they can possibly use thereon, that it therefore follows that no damage can ever ensue, even if the diversion is unlawful and should ripen into a prescriptive right by continuance, and, hence, that their diversion should not be enjoined. The theory of the law of riparian rights in this state is that the water of a stream belongs by a sort of common right to the several riparian owners along the stream, each being entitled to sever his share for use on his riparian land. The fact that a large quantity of water flows down the stream by and beyond the plaintiffs' land does not prove that it goes to waste, nor that the plaintiffs are entitled to take a part of it, as against other riparian owners or users below. Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take, or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use. There is nothing in this case to show how much water is required above

and below by those having rights in the stream. In view of the well-known aridity of the climate and the high state of cultivation in the vicinity, the court could almost take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the various owners under claim of right. But, however this may be, it is settled by the decisions above cited that a party, situated as the plaintiffs are, can enjoin an unlawful diversion, in order to protect and preserve his riparian right." (Opinion, pp. 335-6.)

Southern Cal. Im. Co. v. Wilshire, 144 Cal. 68.

This was an action where defendants and plaintiffs were both found to be riparian owners, and in reviewing the judgment the court defined in clear and precise language what plaintiff's rights as a riparian owner were:

"But the plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through its lands, including that which the defendants allowed to escape, and which seeped into the stream after being used for irrigation, as well as that which flows in the stream in excess of the increase thus received. As such riparian owner, it has the right to have the stream continue to flow through its lands in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel in its land—and whether it is or is not as valuable in a monetary point of view, *or as beneficial to the community in general, as would be the use of a like quantity of water in some other place,* it cannot be taken by the defendants without right, or, in case of a public use elsewhere, without compensation. It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough

if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate (*Moore v. Clear Lake W. W.,* 68 Cal. 146; *Stanford v. Felt,* 71 Cal. 249; *Heilbron v. Fowler S. C. Co.,* 75 Cal. 426; *Conklin v. Pacific I. Co.,* 87 Cal. 296; *Walker v. Emerson,* 89 Cal. 456; *Spargur v. Heard,* 90 Cal. 221)." (Opinion, p. 73.)

Huffner v. Sawday, 153 Cal. 86.

This case held a finding as to the continued cultivation by plaintiff of his riparian lands immaterial, the court saying:

"Finding 15, to the effect that a large part of each of the tracts described in the complaint has for twenty-five years been continously cultivated by means of water taken from the stream is, it is contended, contrary to the evidence. The finding on this point is, so far as concerns the plaintiffs who have riparian rights, not material. Their right to restrain the diversion, by others than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a 'part and parcel' of the land itself (*Duckworth v. Watsonville W. & I. Co.,* 150 Cal. 520 (89 Pac. 340), and plaintiffs are entitled to have restrained any act which would infringe upon this right." (Opinion, p. 91.)

Miller & Lux v. Madera Canal & Irrig. Co., 155 Cal. 59.

This was a case in which the proponents of the visionary scheme of retaining for the "people" rights in the waters of natural streams which they never had, but which nature intended and the common law and our law has held to belong to the adjacent land, hoped to see the Supreme Court of California depart from the rule to which it has so steadfastly held, and modify the doctrine of riparian rights established in that state and in Oregon. Every conceivable argument in favor of the proposition of taking away from the riparian owner a right which nature had given him, without compensation, was advanced. In order to hear and consider further argument along this line, a rehearing was granted, and after the greatest consideration, the court stood firm in its refusal to depart from the rule so long established that a riparian owner is entitled to the enjoyment of the customary flow of the stream, whether it be in torrents following the melting of snows and lasting for a few weeks, flowing out of the banks of the river but in a continuous current, or in quiet streams of even flow throughout the year.

The defendant in this case asserted the right to reservoir what it called the storm, freshet, and flood waters of the Fresno River, which it claimed did not constitute any part of the ordinary or usual flow of the stream. Plaintiff claimed that the rise in the river which brought down this flood or freshet water occurred annually and

constituted the regular annual and usual flow of the river. The affidavits on the part of plaintiff showed:

> "that practically in every year during the winter and early spring months, on account of rainfall and the melting of the snows in the watershed of the stream, the Fresno River carried a large volume of water; that this entire volume of water, if not interfered with, is carried in the channel of the river past the point where the water is diverted from the river into the reservoirs of appellant complained of, and for some distance west of the town of Madera, when the river divides into two or more channels which diverge and flow in the same general direction as the main channel of the river and further on unite with it; that when the volume of water flowing in the river reaches the higher stages a portion of the water flows into these branch channels; that at the highest stages of the flow the water overflows the main and branch channels of the river at various points and spreads over the low-lying lands adjacent thereto; that the main and branch channels of the river and the lands subject to overflow lie in a trough or basin running parallel with the river for a distance of about eighteen miles; that all of the water which so overflows flows on with the water confined in the lower banks of the main and branch channels of the river in a westerly direction and in a continuous body down to Lone Willow slough and finally into the main channel of the San Joaquin River; that none of the water which overflows is vagrant or becomes lost or wasted, but flows in a continuous body, as above stated, within a clearly defined channel, and so continues until the volume of water coming down the stream commences to lower, when the overflow waters recede back into the main channel of the river and flow on with the rest of the water; that this overflow is practically of annual occurrence, and may be and is anticipated in every season of ordinary rainfall within the watershed of

the Fresno River and fails to occur only in seasons of drouth or exceptionally light rainfall." (Language of Department opinion, p. 75.)

The court said:

"Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordiary condition of the seasons is presented when they do not occur; they are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno River has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails.

"As to such waters, it is said in Gould on Waters, section 211, 'Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence floods and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that 'freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years though at no regular intervals.' (*Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426 (7 Am. St. Rep. 183, 17 Pac. 535); *Cairo Railway Co. v. Brevoort*, 62 Fed. 129; *California P. & A. Co. v. Enterprise C. & I. Co.*, 127 Fed. 741.)

"And when such usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low-water mark of dry seasons and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well-defined boundaries, they constitute a single

natural water course. It is immaterial that the boundaries of such stream vary with the seasons or that they do not consist of visible banks. It is only necessary that there be natural and accustomed limits to the channel. If within these limits or boundaries nature has devised an accustomed channel for the limited flow of the waters therein during the dry season, and an accustomed but extended channel for their flow when the volume is increased by annual flood waters, and all flow in one continuous stream between these boundaries and are naturally confined thereto, and when the waters lower the overflow recedes into the main channel, this constitutes one natural watercourse for all such waters and the rights of a riparian owner thereto cannot be invaded or interfered with to his injury. This is the character of the waters of the Fresno River, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted; they flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin River, and while they spread over the bottom lands, or low places bordering on the main channel of the Fresno River as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases.'' (Department Opinion, pp. 76-77.)

The owners of land bordering on such a stream were held to be entitled to all the rights of riparian ownership at all stages of the river.

On rehearing the court, through Mr. Justice Sloss, disposed of the claims made that a different rule than that of the court in department should be applied in the arid west, and that public policy required the storage of water so that the most beneficial use of our natural resources would be achieved.

> "It is suggested that a different rule should apply in a semi-arid climate like that of California, where the fall of rain and snow occurs during only a limited period of the year, and, consequently, streams carry in some months a flow of water greatly exceeding that flowing during the dry season with the result that such increased flow is not, at all points, confined within the banks which marked the limits of the stream at low water. But no authority has been cited, and we see no sufficient ground in principle, for holding that the rights of riparian proprietors should be limited to the body of water which flows in the stream at the period of greatest scarcity. What the riparian proprietor is entitled to as against non-riparian takers is the ordinary and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off. * * *" (Opinion after rehearing, p. 63.)
>
> "It is argued that unless appropriators are permitted to divert and store for future use water which would otherwise run into the sea and be wasted, there will be a failure to make the most beneficial use of the natural resources of the state and that riparian owners should not be permitted to obstruct the development of these resources. It may be that, if non-riparian owners are permitted to intercept the winter flow of streams, in order to

irrigate non-riparian lands or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course. But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself'. Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not without compensation, be taken from the owners of these lands and transferred to others." (Opinion after rehearing, pp. 64-5.)

Miller v. Bay Cities Water Co., 157 Cal. 256.

Since the decision in *Miller & Lux v. Madera Canal & Irrigation Co.*, the same court has had occasion to pass on the right of an owner of land overlying water bearing strata to enjoin the diversion of water which fed this underground supply. The court said that the case

of such land was analogous to the case of land riparian to a stream. It then held that such an owner could enjoin the diversion of storm or flood waters of annual occurrence which by pressure helped to supply the artesian strata.

> "But even if these storms are of short duration and the waters are precipitated with great rapidity into the bay, they cannot be said for that reason also to be waste waters or subject to appropriation. They are only waste waters and capable of appropriation as such, if they serve no useful purpose as storm waters." (Opinion, p. 281.)

In his latest (3rd) edition of his work on water rights, Mr. Wiel, after a review of the decisions already discussed, summarizes as follows:

> "(a) Generally speaking, non-riparian owners have no rights in streams.
>
> "(b) A riparian owner may enjoin non-riparian use although not using the water himself, and he is not required to show damage to use; the injunction is granted to prevent the impairment of the riparian estate through loss of supply for use in the future.
>
> "(c) The raparian owner is limited to no measure of reasonableness based upon any sharing or correlative use with the nonriparian owner or nonriparian use; he is entitled without limit to the full extent to which the natural flow of water does or may in the future contribute benefit to his riparian land, however much he might be forced to forego some thereof in favor of riparian use by other riparian owners.
>
> "(d) Storm flow is natural flow."

Wiel Water Rights in the Western States, 3rd Edition, Sec. 835.

Under these authorities the mere fact that the stream may carry more water than is absolutely necessary for the riparian lands, does not show that there is "any surplus water subject to appropriation", and complainant was entitled to a *final* decree, forever enjoining defendants from diverting from Silvies River any of the waters thereof.

It is sometimes thought, and has often been urged, that certain decisions of the Supreme Court of California are authority for the proposition that equity will not interpose to enjoin the diversion of the waters of a stream during periods of high water resulting from storms or sudden melting of snows. (*Edgar v. Stevinson,* 70 Cal. 286, *Modoc Land and Live Stock Co. v. Booth,* 102 Cal. 151, *Vernon I. Co. v. Los Angeles,* 106 Cal. 237, *Fifield v. Spring Valley Water Works,* 130 Cal. 552.) It is clear, as pointed out in later decisions of the same court, cited above, that these cases are not authority for any such rule. The test in such cases is: Will the storm waters be useful to the riparian owner? If they are, then it is his right, and one that equity will enforce, to have all the water flow as it is wont to flow, both in periods of flood and periods of scarcity. On the contrary, if the flow is more destructive than useful to the riparian owner, as is suggested in some of the cases mentioned, equity would probably refuse injunctive relief.

In this case the court by its decree finds that all the water which defendants claimed the right to divert was beneficial to complainant's lands. Under this finding complainant was entitled to a decree restraining any diversion by defendants, and the reservation contained in the decree was error and the decree in that particular should be reversed.

Respectfully submitted,

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